ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

PETITION FOR RECONSIDERATION

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July 3, 1996

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Cox Communications, Inc. hereby petitions the Commission to reconsider certain aspects of its Second Report and Order in the above-captioned proceeding. For the reasons stated below, the rules adopted by the Commission unduly and unlawfully restrict the ability of cable television operators to operate open video systems and to provide video programming over open video systems operated by local exchange carriers.

INTRODUCTION

The Telecommunications Act of 1996 (the "1996 Act") removed the longstanding cable-telco crossownership prohibition and authorized local exchange carriers ("LECs") to provide cable service over their facilities, subject to the same provisions of Title VI that apply to all other cable operators. The 1996 Act also authorized a new, alternative mode of facilities-based provision of video programming -- the "open video system" ("OVS"). If an operator of a broadband facility agrees to make up to two-thirds of its video capacity available to unaffiliated program providers on a non-discriminatory basis in accordance with

rules promulgated by the Commission, it will be relieved of many of the regulatory obligations of Title VI of the Communications Act of 1934 (the "Communications Act") -- including the obligation to obtain a cable franchise

This option is not restricted by the statute to LECs, although non-LECs may only operate OVS systems to the extent determined by the Commission to be consistent with the public interest. Thus, Section 653(a)(1) provides that

> A local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system that complies with this section. To the extent permitted by such regulations as the Commission may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section.[1/]

The Commission has determined that non-LECs should generally be permitted to operate OVS systems to the same extent and pursuant to the same regulations as LECs. The sole exception is that incumbent cable operators are generally *not* allowed to operate OVS systems in their cable service areas unless their cable systems are subject to effective competition, as defined in Section 623(l)(1) of the Communications Act. Incumbent cable operators will, however, be permitted to operate OVS systems in the absence of effective competition if they demonstrate to the Commission that "entry of a facilities-based competitor into its cable service area would likely be infeasible" or that, because of other particular circumstances, operation of OVS systems would be consistent with the public interest, convenience, and necessity.[2/]

1/ 47 U.S.C. § 573(a).

2/ 47 C.F.R § 76.1501.

This restriction on the operation of OVS systems by cable operators applies, according to the Commission, *even to cable operators that also provide local exchange service in their cable service areas*. According to the Commission,

> The second sentence of Section 653(a)(1) authorizes the Commission to determine when cable operators may become video system operators, and the Commission retains this authority with respect to all cable operators, regardless of whether they are also providing local exchange service. Therefore, although the first sentence of Section 653(a)(1) allows LECs, *without qualification*, to operate open video systems within their telephone service areas, this sentence does not apply to cable operators that are also LECs.[3]

In other words, in the Commission's view, the unqualified grant of authority to LECs, in the first sentence, to operate OVS systems is in fact qualified by the second sentence.

Moreover, while Section 653(b)(1)(A) requires OVS operators to make capacity available to unaffiliated programmers on a nondiscriminatory basis, the Commission has ruled that *this* unqualified requirement is *also* qualified by the second sentence in Section 653(a)(1). Specifically, the Commission has determined that OVS operators may discriminate against competing, in-region cable operators and affiliates of such operators by denying them access to OVS systems.[4]

As we now show, these restrictions on the ability of cable operators to become OVS operators or to provide programming on an unaffiliated OVS system are at odds with both the letter and the intent of the 1996 Act. They will artificially distort the nationwide facilities-

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3/ *Second Report and Order*, ¶ 25 (emphasis added).

4/ *Id.*, ¶¶ 50-56.

based competition that Congress sought to foster, with no countervailing public policy benefits. The Commission should reconsider and remove them.

I. THE ACT AUTHORIZES ALL LECs TO OPERATE OPEN VIDEO SYSTEMS, WHETHER OR NOT THE LECs ARE ALSO CABLE OPERATORS.

The Commission's determination that the first sentence of Section 653(a)(1) permits LECs, "without qualification," to operate OVS systems in their telephone service areas is correct. Therefore, its conclusion that the second sentence of Section 653(a)(1) authorizes it to prohibit LECs that are also cable operators from operating open video systems unless their cable systems are subject to effective competition is incorrect.

The Commission's construction of the second sentence, if correct, would altogether nullify the first sentence. The Commission's authority under the second sentence is not, after all, limited to cable operators. That sentence authorizes "the operator of a cable system *or any other person*" to provide OVS service only to the extent that the Commission allows. If this means that the Commission has authority "to determine when cable operators may become open video system operators . . . regardless of whether they are also providing local exchange service," it must also mean that the Commission has similar authority to determine when "any other person" may become an OVS operator, regardless of whether *it* is also providing local exchange service.

Does the Commission, for example, have authority to specially limit the circumstances in which a long distance carrier that provides local exchange service may operate an OVS system? Or a Bell Operating Company? Of course, it does not. What Congress clearly

intended was to authorize *any* LEC to operate an OVS system in its telephone service area and to direct the Commission to determine the extent to which entities, including cable operators, that are *not* LECs may also operate OVS systems. To construe the statute otherwise would be to render the first sentence meaningless, which would be contrary to established principles of statutory construction[5] and common sense.

Even if the second sentence of Section 653(a)(1) applied *only* to cable operators and not to "any other person," it would still be unreasonable to construe it as applying to cable operators that are also LECs. The Commission construes the second sentence as an *exception* to the first; it suggests that all LECs may, without qualification, operate OVS systems, except that cable operators that are also LECs may only operate OVS systems to the extent that the Commission deems to be in the public interest. But the language of the second sentence does not in any way purport to create an exception to the general rule that LECs may operate OVS systems -- and, as a matter of statutory construction, such exceptions are not generally to be implied unless no other construction is reasonable.[6] In this case, as discussed above, there is a *more* reasonable construction -- *i.e.*, that, *in addition to* LECs, any other entities (including non-LEC cable operators) may *also* operate OVS systems under certain conditions.

5/ See, e.g., 2A N.J. Singer, *Sutherland Statutory Construction ("Sutherland")*, § 46.06 (5th ed. 1992); *United States v. Menasch*, 348 U.S. 528 (1955); *United States v. Rodriguez*, 26 F.3d 4 (1st Cir. 1994).

6/ *See, e.g., Sutherland, supra*, § 47.11.

II. THE ACT DOES NOT PERMIT LECs TO DENY CABLE OPERATORS ACCESS TO THEIR OVS SYSTEMS.

Section 653(b)(1)(A) specifically directs the Commission to promulgate regulations that "prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system."[7/] The Commission has, pursuant to this provision, ruled -- with one important exception -- that "an open video system operator may not discriminate among video programming providers based on their identities."[8/] The sole exception is that an OVS operator

> will be permitted to limit access to the open video system by the *competing, in-region cable operator*, and any video programming provider that is *affiliated with that cable operator*, whether the competing, in-region cable operator or video programming provider is a packager of multiple programming services or an individual programming service.[9/]

Again, in creating this exception to what appears to be an unqualified prohibition on discrimination, the Commission has relied on the second sentence of Section 653(a)(1) -- and, again, its reliance is misplaced. The Commission contends that, because that sentence "specifically addresses the provision of video programming by a cable operator," it has "discretion to determine when to permit a cable operator to provide video programming over an open video system, consistent with the 'public interest, convenience and necessity,' notwithstanding the 1996 Act's general non-discrimination requirements."[10/] But the

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7/ 47 U.S.C. § 573(b)(1)(A).

8/ *Second Report and Order*, ¶ 51.

9/ *Id.*, ¶ 54 (emphasis added).

10/ *Id.*, ¶ 51.

Commission has again ignored the fact that the second sentence of Section 653(a)(1) applies not merely to "the operator of a cable system" but also to "any other person." If this sentence gives the Commission discretion to permit OVS operators to deny access to competing cable operators and their affiliates, it must also give the Commission discretion to permit discrimination against any other program packagers and providers -- discretion that the Commission does not and could not reasonably claim.

In any event, Section 653(a) addresses the question of who may operate OVS systems; it has nothing to do with who may obtain capacity on an OVS system. The Commission itself acknowledges that if Congress had "added the second sentence *merely* to resolve the dispute over cable operators' carriage rights . . . , the more likely place would have been in Section 653(b), which describes video programming providers' carriage rights, not Section 653(a), which addresses the certification process for open video system operators."[11/] The Commission suggests, however, that the sentence was intended to do double duty -- to authorize the Commission to determine *both* the extent to which cable operators and others may operate OVS systems *and* the extent to which cable operators and others may obtain capacity on OVS systems.

If Section 653(a)(1) were intended to constitute an exception to the general non-discrimination requirement in Section 653(b)(1)(A), it is most reasonable to assume that Congress would have so indicated in the latter section. Indeed, Congress *did* indicate those provisions of Title VI that were intended to permit discrimination by OVS operators

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11/ *Id.*, ¶ 16 (emphasis added).

notwithstanding the general prohibition. Specifically, Section 653(b)(1)(A) directs the Commission to prohibit discrimination "except as required pursuant to section 611, 614, or 615" -- the PEG access and must-carry provisions of Title VI, which apply to OVS operators. The specific enumeration of these exceptions indicates that no other statutory provisions were meant to override or be deemed exceptions to the prohibition on discrimination.[12] The absence of any reference to Section 653(a)(1) confirms that Congress did not intend to give the Commission discretion to authorize OVS operators to discriminate against or deny access to cable operators (or "any other person").

III. RESTRICTING THE ABILITY OF CABLE OPERATORS TO OPERATE OVS SYSTEMS UNLESS THEY ARE SUBJECT TO EFFECTIVE COMPETITION DOES NOT SERVE THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

Congress, in enacting the 1996 Act, intended to foster facilities-based competition by removing barriers to the provision of video programming by telephone companies and telephone service by cable operators. Indeed, the Commission itself agreed "that Congress did not intend the 1996 Act, which is designed to eliminate outdated regulatory distinctions, to be used as the basis for creating new ones."[13] And it agreed that "all entities should 'have the option to make the same choices, unconstrained by artificial regulations based on their historic regulatory classification.'"[14]

12/ *See Sutherland, supra*, § 47.11; *Andrus v. Glover Const. Co.*, 446 U.S. 608 (1980); *United States v. Smith*, 499 U.S. 160 (1991); *Qi-Zhuo Meissner*, 70 F.3d 136 (D.C. Cir. 1995).

13/ *Id.*, ¶ 18.

14/ *Id.*, quoting Comments of Cable Telecommunications Association at 2.

Restricting the ability of incumbent cable operators to become OVS operators is directly contrary to these policy prescriptions. To the extent that there are regulatory and economic advantages to operating a video facility as an OVS system rather than as a franchised cable system, preventing incumbent cable operators from operating OVS systems imposes upon such operators an artificial disadvantage in competing with telephone companies to deploy and provide service over broadband facilities. Moreover, there are no countervailing public policy reasons for singling out incumbent cable operators in this manner.

In explaining its decision to bar cable operators from operating OVS systems in the absence of effective competition, the Commission states its belief

> that Congress exempted open video system operators from most Title VI regulations because, in the vast majority of cases, they will be competing with incumbent cable operators for subscribers. Thus, we believe that it is not in the public interest to permit incumbent cable operators, in the absence of competition, to convert their cable systems to open video systems.[15/]

But the Commission believes that it *would* be in the public interest to allow cable operators to convert their systems to OVS systems "where the entry of a facilities-based competitor into a market served by an incumbent cable operator would likely be infeasible."[16/]

This makes little sense. If the reason for freeing OVS operators from most Title VI regulations is that such operators will face facilities-based competition, why should the OVS option be available to those cable operators who face *no* prospect of such competition? The Commission must perceive *another* policy reason for applying truncated Title VI regulations

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15/ *Id.*, ¶ 24.

16/ *Id.*

to OVS providers -- and that reason is obvious. Congress (and the Commission) must have concluded that requiring OVS operators to make up to two-thirds of their capacity available to unaffiliated program providers would serve the public interest in ways that offset or obviated the need for full Title VI regulation. And if the fostering of competition among competing programmers on an OVS justifies reduced Title VI regulation for LECs and for cable operators with no prospect of facilities-based competition, there is no reason why it should not justify such reduced regulation for cable operators who *do* face the prospect of facilities-based competition but do not yet experience it to the degree specified in the effective competition definitions in Title VI.

The OVS option was, to be sure, intended to facilitate the entry of LECs into the video marketplace. Congress believed that such entry might be impeded by the need to comply with the full range of franchise requirements imposed by Title VI, and it created the OVS option as a potentially less burdensome means of providing video programming in a manner that it believed served the public interest. If the regulatory tradeoff of reduced Title VI regulation in return for relinquishing programming control over two-thirds of capacity does, in fact, make it easier for telephone companies to enter the video marketplace, this will be the case whether or not cable operators are also afforded the same regulatory option. The effect of *precluding* cable operators from also opting for the same tradeoff would be not simply to reduce the LECs' regulatory burdens but to give them a competitive *advantage* in the video marketplace. There is no reason to believe that LECs need -- or that Congress intended to give them -- such a competitive advantage

CONCLUSION

For the foregoing reasons, the Commission should reconsider its rules regarding the provision of OVS service by cable operators. The Act permits cable operators that are also LECs to become OVS operators, regardless of whether their cable service is subject to effective competition. The Act also prohibits LECs from discriminating against and denying access to competing cable operators. Finally, while the Commission has authority to determine the extent to which cable operators that are *not* LECs may become OVS operators, prohibiting such cable operators from operating OVS systems unless they are subject to effective competition will impair the facilities-based competition that Congress intended to promote -- and is contrary to the public interest.

Respectfully submitted,

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